

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTOPHER WILSON,)
)
 PLAINTIFF)
)
 v.)
)
 CHRISTOPHER LYONS, ET AL.,)
)
 DEFENDANTS)

Civil No. 02-218-P-H

**ORDER ADOPTING IN PART AND REJECTING IN PART
RECOMMENDED DECISION OF THE MAGISTRATE JUDGE**

The United States Magistrate Judge filed with the court on May 22, 2003, with copies to counsel, his Recommended Decision on Defendants' Motion for Summary Judgment. Docket No. 12. The plaintiff filed an objection to the Recommended Decision and a request for oral argument on June 6, 2003. Oral argument was held on July 8, 2003. I have reviewed and considered the Recommended Decision, together with the entire record; I have made a *de novo* determination of all matters adjudicated by the Recommended Decision; and I concur with the recommendations of the United States Magistrate Judge for the reasons set forth in his Recommended Decision, with one observation and one exception, and determine that no further proceeding is necessary.

First, on Counts 7 and 8, Torres v. Superintendent of Police of Puerto Rico, 893 F.2d 404 (1st Cir. 1990), controls, and the plaintiff's case does not meet

Torres's standard. Any excessive force was not in connection with the use of the judicial process, but instead followed upon it.

Second, I disagree with the Magistrate Judge on the applicability of United States v. Lombard, 853 F. Supp. 543, 546 n.2 (D. Me. 1993). Relying on Lombard, the Magistrate Judge gave collateral estoppel effect here to the state judge's ruling on the plaintiff's suppression motion in a criminal case that the police officers had probable cause to arrest him. But in that criminal proceeding, the plaintiff (there the defendant) could not appeal the adverse ruling because he was acquitted at trial. Thus, the plaintiff never had the opportunity to attack the adverse ruling. Whatever Lombard's correctness¹ and scope² when it was decided, the Maine Law Court has recently made clear that the availability of appeal is critical for a prior court's suppression order to have collateral estoppel effect.

First, there obviously must be an identity of issues in the two proceedings. Second, a defendant must have had sufficient incentive to have vigorously and thoroughly litigated the issue in previous proceedings. . . . Third, the defendant estopped must have been a party to the previous litigation. Fourth, the applicable law must be identical in both proceedings. . . . Fifth and finally, the first proceeding must result in a final judgment on the merits that provides the defendant not only the opportunity to appeal, but also sufficient incentive.

¹ Lombard called the issue a matter of Maine law (the parties here agree with that proposition), but proceeded to cite a Federal Circuit case on the issue of finality/appealability, a case that itself described appealability as "the right, even if not exercised, to challenge on appeal the correctness of the earlier decision." Interconnect Planning Corp. v. Feil, 774 F.2d 1132, 1135 (Fed. Cir. 1985). Lombard also cited the Restatement of (Second) Judgments § 13 (1982). Comment g does indicate some flexibility, particularly when necessary to avoid delay because the earlier decision is still subject to appeal, but lists review on appeal and the availability of appeal as factors in determining that the decision should be given preclusive effect.

² Lombard pointed out that the decision to which it granted collateral estoppel had in fact been reviewed, albeit by the judge who made the original decision. 853 F. Supp. at 546 n.2.

State of Maine v. Hider, 715 A.2d 942, 946 (Me. 1998), quoting Richard B. Kennelly, Jr., Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases, 80 Va. L. Rev. 1379, 1385 (1994). I follow this most recent pronouncement, and decline to give collateral estoppel effect to the Maine District Court's finding of probable cause.

It is therefore **ORDERED** that the Recommended Decision of the Magistrate Judge is hereby **ADOPTED IN PART AND REJECTED IN PART**. The defendants' motion for summary judgment is **GRANTED** as to Counts VII and VIII and as to any claims in Counts V and VI arising out of the defendants' testimony in any state-court proceeding, and is otherwise **DENIED**.

So ORDERED.

DATED: JULY 9, 2003

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

U.S. District Court
District of Maine (Portland)
Civil Docket For Case #: 02-CV-218

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 plaintiff

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and

Sean Lally

 defendants

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(See Above)